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**FACSIMILE TRANSMITTAL SHEET AND
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CENTRAL FAX CENTER****APR 06 2005****TO: Examiner Everett White - United States Patent and Trademark Office**

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Linda S. Jernigan (Signature)

FROM: Linda S. Jernigan (Typed or printed name of person signing Certificate)

Fax No. 513-622-3300

Phone No. 513-622-2811

Listed below are the item(s) being submitted with this Certificate of Transmission:**

Number of Pages Including this Page: 19

- 1) Fee Transmittal – orig. w/copy
- 2) Appeal Brief – 16 pgs.
- 3)
- 4)
- 5)

Inventor(s): Cimiluca et al.

S.N.: 10/633,970

Filed: August 4, 2003

Docket No.: 9153R

Comments:

****Note:** Each paper must have its own certificate of transmission, OR this certificate must identify each submitted paper.

FEE TRANSMITTAL for FY 2005 Patent fees are subject to annual revision. Effective December 8, 2004	Complete if Known	
	Application Number	10/633,970
	Confirmation Number	5176
	Filing Date	August 4, 2003
	First Named Inventor	Cimiluca et al.
	Examiner Name	Everett White
	Art Unit	1623
TOTAL AMOUNT OF PAYMENT (\$500)		Attorney Docket No. 9153R

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SUBMITTED BY		Complete (if applicable)	
Name (Print/Type)	Cynthia L. Clay	Registration No. (Attorney/Agent)	54,930
Signature	<i>Cynthia L. Clay</i>	Telephone	(513) 622-0291
		Date	April 6, 2005

This collection of information is required by 37 CFR 1.17. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon individual case. Any comments on the amount of time you are required to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P. O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

Feetrms.doc (Revised for P&G use 01/24/2005)

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Form 100-100 (Revised for P&G use 01/24/2005)

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Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/633,970
Appellant(s) : Cimiluca et al.
Filed : August 4, 2003
Title : COMPOSITION COMPRISING A PLURALITY OF PARTICLES
OR AGGLOMERATES HAVING A DEFINED PARTICLE SIZE
TC/A.U. : 1623
Examiner : E. White
Conf. No. : 5176
Docket No. : 9153R
Customer No. : 27752

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450
Dear Sir,

This Brief is filed pursuant to the appeal from the U.S. Patent and Trademark Office decision mailed December 2, 2004 finally rejecting Claims 1-59. A Notice of Appeal was timely filed on February 25, 2005.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 1-59 are finally rejected. Claims 1-59 are appealed.

A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

Appl. No. 10/633,970
Atty. Docket No. 9153R
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STATUS OF AMENDMENTS

No amendment was filed.

SUMMARY OF CLAIMED SUBJECT MATTER

The present invention claims a composition comprising a portion of psyllium seed husk as a plurality of particles, or optionally agglomerates, having a defined mean particle size distribution. In particular, the present invention is directed to compositions comprising a plurality of polysaccharide particles, wherein the polysaccharide particles comprise a polysaccharide component comprising xylose and arabinose, wherein the ratio of the xylose to the arabinose is at least about 3 : 1, by weight, and wherein the polysaccharide particles have a mean particle size distribution of from about 0.001 microns to about 150 microns. (Specification page 4, lines 30-34, and page 5, lines 1-6).

GROUND'S OF REJECTION TO BE REVIEWED ON APPEAL

- (I) Rejection Under 35 USC 103(a) Over Nakamura et al (US 6,045,847) in view of Marlett et al (US 6,287,609) or Colliopoulos (US 5,009,916).
- (II) Rejection Under 35 USC 103(a) Over Nakamura et al (US 6,045,847) and Marlett et al (US 6,287,609) in view of Barbera (US 5,425,945).

ARGUMENTS

Claims 1-59 are patentable over Nakamura et al (US 6,045,847) in view of Marlett et al (US 6,287,609) or Colliopoulos (US 5,009,916) because the references fail to teach or suggest all of the claimed limitation of the present invention and, therefore, do not establish a *prima facie* case of obviousness.

The Examiner states that claims 1-59 are rejected under 35 USC § 103 as being unpatentable over Nakamura et al (US 6,045,847) in view of Marlett et al (US 6,287,609) or Colliopoulos (US 5,009,916). The Examiner states that Nakamura discloses a composition comprising a water-soluble hemicellulose, which is a polysaccharide

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Customer No. 27752

containing xylose and arabinose. Additionally, the Examiner states that when Nakamura is combined with the Marlett the ratio of xylose to arabinose is at least 3:1.

Appellants respectfully traverse this rejection, as the combination of the references does not establish a *prima facie* case of obviousness because the references fail to teach or suggest all of the claimed limitation of the present invention. To properly reject a claim under 35 U.S.C. §103, three elements must be met by the references to establish a *prima facie* case of obviousness: (a) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings; and (b) there must be a reasonable expectation of success; and (c) the prior art references must teach or suggest all the claim limitations. In re Fine, 5 USPQ2d 1596 (Fed. Cir. 1988); In re Merck & Co., Inc., 231 USPQ 375 (Fed. Cir. 1986); In re Royka, 180 USPQ 580 (CCPA 1974). See also MPEP 2142.

The Nakamura references discloses the use of a water-soluble hemicellulose that is derived from husks of oily seeds of soybean, palm, coconut, corn or cottonseed with the oil and protein removed, and lees from grains such as rice or wheat and roots such as beets with the starch or sugar removed. See Column 3, lines 44-51. Each of these fibers is water soluble and is rapidly broken down in the colon. Due to this fact, these fibers have no laxative effects on the bowel and are not effective at treating constipation and other disorders of the bowel. The psyllium seed husks derived polysaccharide particles of the present invention are not readily broken down in the colon so they pass through the colon and aid in making the stool soft and easy to eliminate thereby aiding in treating constipation and other bowel disorders. Additionally, Nakamura fails to teach or suggests a polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3 : 1, a polysaccharide particle that comprises polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3 : 1, by weight, and wherein the polysaccharide particles have a mean particle size distribution of from about 0.001 microns to about 150 microns as disclosed and claimed in the present invention.

Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

The Examiner states that Marlett teaches the preparation of fractions obtained from psyllium seed husk that comprises xylose and arabinose. However, Marlett fails to teach or suggest a polysaccharide particle that comprises polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3: 1, by weight, and wherein the polysaccharide particles have a mean particle size distribution of from about 0.001 microns to about 150 microns as disclosed and claimed in the present invention.

Nakamura and Marlett both fail to provide Appellants' essential polysaccharide particle that comprises polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3 : 1, by weight, and wherein the polysaccharide particles have a mean particle size distribution of from about 0.001 microns to about 150 microns. Assuming *arguendo* that one having ordinary skill in the art would combine the disclosures of Nakamura and Marlett, one would still fall short of the of Appellants' claimed invention only to arrive at a water-soluble hemicellulose that are water soluble and are rapidly broken down in the colon that comprise xylose and arabinose. The combination of Nakamura and Marlett do not teach or suggest each and every element of Appellants' presently claimed invention. The polysaccharide particles of the present invention, therefore, cannot be rendered as obvious over the teachings of Nakamura in view of Marlett.

The Examiner states that Colliopoulos teaches a psyllium high fiber drink mix made by agglomerating a base comprising at least 5 to 99 weight percent psyllium mucilloid. However, the present invention is directed to certain fractions of psyllium seed husk. The psyllium high fiber in the Colliopoulos reference when it comes in contact with water would form a gelatinous mass and would exhibit very poor dispersability. The present invention comprises composition that contain certain fractions of psyllium seed husk with defined ratio of xylose and arabinose wherein the composition comprises particles that have a defined particle size, or agglomerates with defined particle size which are intended for dilution in an aqueous liquid and provide excellent mouth feel, excellent dispersion in an aqueous liquid and sedimentation. The present invention

Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

teaches the removal or fractioning off of the components which contribute to the unpleasant or unsafe qualities of the psyllium husk. Therefore, one of ordinary skill in the art would not be motivated to combine the teaching of Colliopoulos with Nakamura or Marlett since the teachings of Colliopoulos fail to teach or suggest the use of at least 5 to 99 weight percent of polysaccharide particles that are fractioned off of the psyllium seed husk.

The combination of Nakamura and Marlett or Colliopoulos does not teach or suggest each and every element of Appellants' presently claimed invention. The polysaccharide particles of the present invention, therefore, cannot be rendered as obvious over the teachings of Nakamura in view of Marlett or Colliopoulos. "Citing a reference that merely indicates that isolated elements and/or features recited in the claims are known is not sufficient basis for concluding that the combination of claimed elements would be obvious." *See Ex parte Hiyamizu*, 10 U.S.P.Q. 2D (BNA) 1393, 1394 (1988). "The genius of invention is often a combination of known elements which in hindsight seems preordained. To prevent hindsight invalidation of patent claims, the law requires some 'teaching, suggestion, or reason' to combine cited references." *See McGinley v. Franklin Sports, Inc.*, 262 F. 3d 1339, 60 USPQ2d 1001 (Fed. Cir. 2001). "Determinations of obviousness can not be based on the hindsight combination of components selectively culled from the prior art to fit parameters." *See ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 48 USPQ2d 1321 (Fed. Cir. 1998). "There should be something in the prior art or a convincing line of reasoning in the answer suggesting the desirability of combining the reference in such a manner as to arrive at the claimed invention." *In re Dembiczak* 175 F. 3d 994, 999 (Fed. Cir. 1999).

Therefore, Appellants contend that the claimed invention is unobvious and that the rejection should be withdrawn.

Claims 1, 15, 16, 19, 27, 28, 32, 33, 35, 43, 44, 52 and 56-59 are patentable over Nakamura et al (US 6,045,847) and Marlett et al (US 6,287,609) in view of Barbera (US 5,425,945) because the references fail to teach or suggest all of the claimed

Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

limitation of the present invention and, therefore, do not establish a *prima facie* case of obviousness.

Claims 1, 15, 16, 19, 27, 28, 32,33, 35, 43,44, 52 and 56-59 are rejected under 35 USC § 103 as being unpatentable over Nakamura et al (US 6,045,847) and Marlett et al (US 6,287,609) in view of Barbera (US 5,425,945).. The Examiner applies Nakamura et al (US 6,045,847) and Marlett et al (US 6,287,609) as above. Appellants respectfully traverse this rejection, as the combination of the references does not establish a *prima facie* case of obviousness because the references fail to teach or suggest all of the claimed limitation of the present invention.

The Examiner has failed to establish a *prima facie* case of obviousness. Appellants assert that the arguments presented above also apply to the present rejection since one of skill in the art would not have sufficient motivation to combine the previously cited references. Importantly, The references do not teach or suggest the essential polysaccharide particle that comprises polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3 : 1, by weight, and wherein the polysaccharide particles have a mean particle size distribution of from about 0.001 microns to about 150 microns. As mentioned in the previous arguments, "To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art." MPEP § 2143.03 citing *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974).

The Examiner states that Example 1 in Barbera shows polysaccharide particles having the instantly claimed particle size. However, if one looks to Example 1 of the Barbera patent, Example 1 discloses a steam sanitized psyllium husks having a particle size of 98% minimum through 100 mesh screen. *See* Example 1, lines 24-27. Barbera fails to teach or suggest a composition that contains certain fractions of psyllium seed husk with defined ratio of xylose and arabinose wherein the composition comprises polysaccharide particles that have a defined particle size, or agglomerates comprising polysaccharide particles with defined particle size.

Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

Additionally, the Examiner states that Barbera discloses agglomerated psyllium husk containing edible acid, wherein the edible acid include citric acid and also sets forth the use of maltodextrin as the agglomerating material. Barbera discloses agglomerating material including water dispersible hydrolyzed starch oligosaccharide, monosaccharide, di-saccharide, polyglucose, polymaltose, and mixtures thereof which is used as an agglomerating material coating on said psyllium husk. *See* Column 3, lines 40-52. Also, the edible acids are dispersed throughout the agglomerating material coating on the psyllium husk. *See* Column 4, lines 53-59. In the present invention, the agglomerate comprises the polysaccharide component and can comprise a dispersing component that is not coated on the agglomerate but either a component of the agglomerate or distinct from the agglomerate. The present invention can comprises one or more layers surrounding the agglomerate but these layers are a hydrophobic layer comprised of material selected from fatty acids, fatty acid derivatives, polymers and mixtures.

Therefore, Babera fails to teach or suggest polysaccharide particle that comprises polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3:1, by weight, and wherein the polysaccharide particles have a mean particle size distribution of from about 0.001 microns to about 150 microns.

The combination of Nakamura and Marlett or Babera does not teach or suggest each and every element of Appellants' presently claimed invention. The polysaccharide particles of the present invention, therefore, cannot be rendered as obvious over the teachings of Nakamura in view of Marlett or Babera. "Citing a reference that merely indicates that isolated elements and/or features recited in the claims are known is not sufficient basis for concluding that the combination of claimed elements would be obvious." *See Ex parte Hiyamizu*, 10 U.S.P.Q. 2D (BNA) 1393, 1394 (1988). "The genius of invention is often a combination of known elements which in hindsight seems preordained. To prevent hindsight invalidation of patent claims, the law requires some 'teaching, suggestion, or reason' to combine cited references." *See McGinley v. Franklin Sports, Inc.*, 262 F. 3d 1339, 60 USPQ2d 1001 (Fed. Cir. 2001). "Determinations of obviousness can not be based on the hindsight combination of components selectively

Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

culled from the prior art to fit parameters." *See ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 48 USPQ2d 1321 (Fed. Cir. 1998). "There should be something in the prior art or a convincing line of reasoning in the answer suggesting the desirability of combining the reference in such a manner as to arrive at the claimed invention." *In re Dembiczak* 175 F.3d 994, 999 (Fed. Cir. 1999).

Therefore, Appellants contend that the claimed invention is unobvious and that the rejection should be withdrawn.

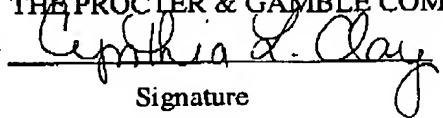
SUMMARY

In view of all of the above, it is respectfully submitted that the aforementioned rejections are erroneous. The Board's reversal of the rejections is respectfully requested.

Respectfully Submitted,

THE PROCTER & GAMBLE COMPANY

By


Signature

Cynthia L. Clay

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April 6, 2005

Customer No. 27752

Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

CLAIMS APPENDIX

1. (original) A composition comprising a plurality of polysaccharide particles, wherein the polysaccharide particles comprise a polysaccharide component comprising xylose and arabinose, wherein the ratio of the xylose to the arabinose is at least about 3 : 1, by weight, and wherein the polysaccharide particles have a mean particle size distribution of from about 0.001 microns to about 150 microns.
2. (original) The composition according to Claim 1 comprising from about 10% to about 90% by of the polysaccharide component by weight of the composition.
3. (original) The composition according to Claim 1 comprising from about 20% to about 50% by of the polysaccharide component by weight of composition.
4. (original) The composition according to Claim 1 comprising from about 30% to about 70% of the polysaccharide component by weight of composition.
5. (original) The composition according to Claim 1 wherein the ratio of the xylose to the arabinose is from about 3 : 1 to about 6 : 1, by weight.
6. (original) The composition according to Claim 5 wherein the polysaccharide particles further comprise a component selected from the group consisting of galactose, glucose, uronic acid, and mixtures thereof.
7. (original) The composition according to Claim 6 wherein the mean particle size distribution of the polysaccharide particles is from about 0.1 microns to about 125 microns.

Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

8. (original) The composition according to Claim 7 wherein the mean particle size distribution of the polysaccharide particles is from about 1 micron to about 100 microns.
9. (original) The composition according to Claim 6 wherein the ratio of the xylose to the arabinose is from about 3 : 1 to about 5 : 1, by weight.
10. (original) The composition according to Claim 9 further comprising a starch, wherein the polysaccharide particles and at least a portion of the starch are physically distinct.
11. (original) The composition according to Claim 10 comprising from about 10% to about 90% of the starch, by weight of the composition.
12. (original) The composition according to Claim 9 further comprising a gum, wherein the polysaccharide particles and at least a portion of the gum are physically distinct.
13. (original) The composition according to Claim 12 comprising from about 0.001% to about 10% of the gum, by weight of the composition.
14. (original) The composition according to Claim 13 wherein at least one gum is selected from the group consisting of tara gum and guar gum.
15. (original) The composition according to Claim 1 further comprising a plurality of agglomerates, wherein the agglomerates comprise the polysaccharide particles and a dispersing component selected from the group consisting of binders, suspending agents, edible acids, and mixtures thereof.
16. (original) The composition according to Claim 15 wherein the agglomerates have a mean particle size distribution of from about 100 microns to about 500 microns.

Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

17.(original) The composition according to Claim 16 wherein the ratio of the xylose to the arabinose is from about 3 : 1 to about 6 : 1, by weight.

18.(original) The composition according to Claim 17 wherein the polysaccharide particles further comprise a component selected from the group consisting of galactose, glucose, uronic acid, and mixtures thereof.

19.(original) The composition according to Claim 18 wherein the mean particle size distribution of the agglomerates is from about 100 microns to about 400 microns.

20.(original) The composition according to Claim 19 further comprising a component selected from the group consisting of lubricating agents, emulsifiers, surfactants, cellulosic materials, and mixtures thereof.

21.(original) The composition according to Claim 18 wherein the ratio of the xylose to the arabinose is from about 3 : 1 to about 5 : 1, by weight.

22.(original) The composition according to Claim 21 further comprising a starch, wherein the agglomerates and at least a portion of the starch are physically distinct.

23.(original) The composition according to Claim 22 comprising from about 10% to about 90% of the starch, by weight of the composition.

24.(original) The composition according to Claim 21 further comprising a gum, wherein the agglomerates and at least a portion of the gum are physically distinct.

25.(original) The composition according to Claim 24 comprising from about 0.001% to about 10% of the gum, by weight of the composition.

Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

26.(original) The composition according to Claim 25 wherein at least one gum is selected from the group consisting of tara gum and guar gum.

27.(original) The composition according to Claim 18 wherein the agglomerates comprise from about 10% to about 90% of the binder, by weight of the agglomerates.

28.(original) The composition according to Claim 27 wherein the binder comprises maltodextrin.

29.(original) The composition according to Claim 28 wherein the agglomerates comprise from about 20% to about 80% of the xylose and arabinose, by weight of the agglomerates.

30.(original) The composition according to Claim 29 wherein the agglomerates comprise from about 10% to about 60% of the binder, by weight of the agglomerates.

31.(original) The composition according to Claim 30 wherein the agglomerates comprise from about 30% to about 70% of the xylose and arabinose and from about 20% to about 50% of the binder, all by weight of the agglomerates.

32.(original) The composition according to Claim 27 wherein the agglomerates further comprise an edible acid.

33. (Previously amended) The composition according to Claim 32 wherein at least one edible acid is selected from the group consisting of lactic acid, citric acid, malic acid, fumaric acid, adipic acid, phosphoric acid, gluconic acid, tartaric acid, ascorbic acid, acetic acid, and succinic acid.

Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

34. (original) The composition according to Claim 33 wherein the agglomerates comprise from about 0.001% to about 8% of the edible acid, by weight of the agglomerates.

35. (original) The composition according to Claim 34 wherein at least one edible acid is citric acid.

36.(original) The composition according to Claim 27 further comprising a starch, wherein the agglomerates and at least a portion of the starch are physically distinct.

37.(original) The composition according to Claim 36 comprising from about 10% to about 90% of the starch, by weight of the composition.

38.(original) The composition according to Claim 27 further comprising a gum, wherein the agglomerates and at least a portion of the gum are physically distinct.

39.(original) The composition according to Claim 38 comprising from about 0.001% to about 10% of the gum, by weight of the composition.

40.(original) A composition comprising a plurality of agglomerates, wherein the agglomerates comprise a polysaccharide component comprising xylose and arabinose, wherein the ratio of the xylose to the arabinose is at least about 3 : 1, by weight, and wherein the agglomerates have a mean particle size distribution of from about 100 microns to about 500 microns.

41.(original) The composition according to Claim 40 wherein the agglomerates further comprise a dispersing component selected from the group consisting of binders, suspending agents, edible acids, and mixtures thereof.

Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

42.(original) The composition according to Claim 41 wherein the agglomerates further comprise a component selected from the group consisting of galactose, glucose, uronic acid, and mixtures thereof.

43.(original) The composition according to Claim 42 wherein the mean particle size distribution of the agglomerates is from about 100 microns to about 400 microns.

44. (original) The composition according to Claim 43 wherein the mean particle size distribution of the polysaccharide particles is from about 125 microns to about 350 microns.

45. (original) The composition according to Claim 41 wherein the ratio of the xylose to the arabinose is from about 3 : 1 to about 6 : 1, by weight.

46. (original) The composition according to Claim 45 further comprising a starch, wherein the agglomerates and at least a portion of the starch are physically distinct.

47.(original) The composition according to Claim 48 comprising from about 10% to about 90% of the starch, by weight of the composition.

48. (original) The composition according to Claim 47 further comprising a gum, wherein the agglomerates and at least a portion of the gum are physically distinct.

49. (original) The composition according to Claim 48 comprising from about 0.001% to about 10% of the gum, by weight of the composition.

50. (original) The composition according to Claim 48 wherein at least one gum is selected from the group consisting of tara gum and guar gum.

Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

51.(original) The composition according to Claim 47 wherein the agglomerates comprise from about 10% to about 90% of the binder, by weight of the agglomerates.

52. (original) The composition according to Claim 51 wherein the binder comprises maltodextrin.

53.(original) The composition according to Claim 52 wherein the agglomerates comprise from about 20% to about 80% of the xylose and arabinose, by weight of the agglomerates.

54.(original) The composition according to Claim 53 wherein the agglomerates comprise from about 10% to about 60% of the binder, by weight of the agglomerates.

55.(original) The composition according to Claim 54 wherein the agglomerates comprise from about 30% to about 70% of the xylose and arabinose and from about 20% to about 50% of the binder, all by weight of the agglomerates.

56. (original) The composition according to Claim 53 wherein the agglomerates further comprise an edible acid.

57.(Previously amended) The composition according to Claim 56 wherein at least one edible acid is selected from the group consisting of lactic acid, citric acid, malic acid, fumaric acid, adipic acid, phosphoric acid, gluconic acid, tartaric acid, ascorbic acid, acetic acid, and succinic acid.

58.(original) The composition according to Claim 57 wherein the agglomerates comprise from about 0.001% to about 8% of the edible acid, by weight of the agglomerates.

Appl. No. 10/633,970
Atty. Docket No. 9153R
Appellant Brief April 6, 2005
Reply to Office Action of December 2, 2004
Notice of Appeal February 25, 2005
Customer No. 27752

59. (original) The composition according to Claim 58 wherein at least one edible acid is citric acid.